

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

To be argued by:
John J. McCann
Estimated Time: 15 Minutes

Docket
No. 77-1455

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— v. —

DANIEL B. ZOGBI,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District of New York

BRIEF AND APPENDIX FOR APPELLEE,
United States of America

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL B. ZOGBI,

Defendant-Appellant.

—
BRIEF AND APPENDIX FOR APPELLEE,
United States of America
—

STATEMENT OF THE ISSUES

1. Whether the defendant freely, voluntarily, and intelligently waived his right against self-incrimination after being adequately advised of his rights under the Miranda decision in the Fifth Amendment.

2. Whether the evidence introduced at the trial of defendant was sufficient and trustworthy and was properly admitted against the defendant.

BRIEF FOR APPELLEE

STATEMENT OF THE CASENature and Disposition of Case in Court Below
and Procedural Background

On August 18, 1976, a federal grand jury, sitting in the Northern District of New York and impaneled in Auburn, New York, returned an indictment charging the defendant, Daniel B. Zogbi, with two counts. Count one of the indictment charged that the defendant, Daniel B. Zogbi, did knowingly import or bring into the United States a firearm, to wit: the receiver of one Thompson, semi-automatic carbine, serial number 1729, model 1927A1, in violation of Title 18, United States Code, Sections 922(1), and 924(a). Count two of the indictment charged that the defendant on the same date (July 25, 1976) did smuggle into the United States the receiver for one Thompson, semi-automatic carbine, serial number 1729, model 1927(a)(1), contrary to law in that the defendant, Daniel B. Zogbi, did not present said merchandise for inspection by a Customs Officer at the first Port of Entry at which such merchandise arrived in the United States, nor manifest such merchandise, as required by law, in violation of Title 18, United States Code, Section 545.

The defendant, Daniel B. Zogbi, was arraigned at Albany, New York on September 1st, 1976. At that time the defendant plead not guilty. The defendant was released on \$2,000.00 bond.

The defendant requested various extensions of time to file motions for discovery and inspection and the suppression of evidence. The case was marked ready by the Government and was placed on the trial calendar.

On February 22nd, 1977 a jury was drawn and sworn. At that time defense counsel moved for suppression of oral statements made by the defendant. After a hearing was conducted the court denied said motion. (Tr. pp. 38-39, App. 22-23.

On February 23rd, 1977 at the conclusion of the Government's case, the Government moved to dismiss Count Two of the indictment and it was granted. (Tr. p. 133, App. 48.

On February 24th, 1977 the Honorable Lloyd F. MacMahon, United States District Judge, Southern District of New York, Sitting by Designation in the Northern District of New York, (the trial judge) charged the jury.

Defense counsel took no exceptions to the charge. (Tr. p. 175, App. 49). The jury returned a verdict of guilty to Count One of the indictment. The defendant's bail was increased to \$10,000.00 and was posted and the defendant was released pending sentencing.

On April 22nd, 1977 the defendant was sentenced to sixty (60) days to run concurrently with sentences heretofore imposed by the United States District Court for the District of Vermont, upon defendant's convictions on Indictments 76-60 and 76-79 (SM). The defendant was continued on ten thousand dollars bail pending appeal. A notice of appeal was filed on behalf of the defendant on April 22nd, 1977.

STATEMENT OF FACTS

Prior to the trial of this action, a suppression hearing was conducted with regard to the voluntariness of statements made by the defendant to Special Agents Kopesky and Conrad, special agents of the Treasury Department, U. S. Customs Service. (Tr. pp. 17-38, App. 1-22).

Defendant-Appellant's appeal centers on the question of the voluntariness of the statements given by the defendant to Special Agents of the United States

Customs Service and the waiving of his right to remain silent under Miranda.

POINT I

THE FINDINGS OF THE TRIAL COURT THAT THE MIRANDA REQUIREMENTS WERE SATISFIED REGARDING STATEMENTS MADE BY DEFENDANT-APPELLANT TO SPECIAL AGENTS OF THE TREASURY DEPARTMENT AT HIGHGATE SPRINGS, VERMONT, ON JULY 29, 1976, SHOULD NOT BE DISTURBED.

- A. SINCE DEFENDANT-APPELLANT WAS NOT IN CUSTODY AS DEFINED BY MIRANDA AND SUBSEQUENT CASES AT THE TIME HE MADE THESE STATEMENTS, MIRANDA WARNINGS WERE NOT CONSTITUTIONALLY REQUIRED.

The requirements set out in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) regarding the admissibility of statements obtained from a defendant do not apply unless the statements were made during a custodial interrogation. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612. This limitation on the extent of the Miranda decision was recently reaffirmed in Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977) (per curiam):

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody". It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited. (429 U.S. at 495, 97 S.Ct. at 714)

See also Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed. 2d 1 (1976).

A test for determining whether a defendant was in custody for Miranda purposes was devised in United States v. Hall, 421 F.2d 540 (2d Cir. 1969). The Court of Appeals said:

While the Court's language in Miranda was imprecise, doubtless deliberately so, it conveys a flavor of some affirmative action by the authorities other than polite interrogation [I]t suggests that in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have needed a request to depart or to allow the suspect to do so. (421 F.2d at 544-545)

Factors considered in applying this test were the amount of information held by the interrogators linking the suspect to the crime, the location and size of the interview

room, the number of interrogators present, the temporal extent of questioning, any threats regarding future arrest, and the degree to which the suspect's conduct was susceptible of innocent explanation.

In the instant case the statements by defendant-appellant were made to special agents of the United States Customs Service.

This setting is very unusual in that Customs officials are empowered to conduct border searches on the strength of mere suspicion without probable cause or search warrants. Title 19, United States Code, Sections 482, 1581(a); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968). Miranda warnings are not necessary at the "stop and search" point in Customs border investigations. Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969), cert. den. 396 U.S. 858, 90 S.Ct. 124 (1969), United States v. Kurfess, 426 F.2d 1017 (7th Cir. 1970), cert. den. 400 U.S. 830, 91 S.Ct. 60 (1970).

In the present case the investigation had proceeded beyond search at the point of entry to an interview with special agents not involved with border inspections. (Tr. pp. 34-35, 24. App. 18-19, 8).

In United States v. Gomez Londono, 553 F.2d 805 (2d Cir. 1977), a case similar to the case at bar, Customs officials questioned the defendant regarding the amount of money he was taking out of the country without giving him any Miranda warnings. The Court of Appeals held that "the circumstances surrounding the questioning did not amount to a custodial interrogation," citing Beckwith and Mathiason, 553 F.2d at 811.

Following this ad hoc approach, the totality of the circumstances surrounding the interview between defendant-appellant and Customs agents on July 29, 1977 should be considered to determine whether the questioning constituted a custodial interrogation. Beckwith, 425 U.S. at 347-348, 96 S.Ct. at 1616-1617, United States v. Mackiewicz, 401 F.2d 219, 222 (2d Cir. 1968). The factors outlined in Hall, discussed above, provide a guideline. At the time Zogbi made his statements he was not under arrest (Tr. pp. 22-23, App. 6-7). The record contains no evidence of any threat of arrest. Only two agents were present. (Tr. p. 37, App. 21). The interview did take place in a government building. However, this building was the border crossing station at the point where Zogbi voluntarily entered the United States. (Tr. p. 33, App. 17). As such it lacked the coercive atmosphere associated with

custodial interrogations. In fact, the interview apparently took place in an office, according to the testimony of defendant-appellant, and not in a special interrogation booth. (Tr. p. 23, App. 7). The Customs agents also had independent information that Zogbi was transporting firearm components. (Tr. pp. 34-36, App. 18 - 20).

The statement made by Agent Kopesky to Zogbi, that he didn't know if there was "any problem", further suggests that the purpose of the questioning was not to take advantage of a coercive, custodial situation to obtain incriminating statements. (Tr. p. 31, App. 15). Rather, the Customs agents were engaged in investigative questioning, much like the Federal Agents conscientiously interviewing a man under considerable suspicion in Hall, supra.

This interview fails to constitute a custodial interrogation under Hall and Mathiason, supra. Therefore, Miranda does not apply by its own terms.

- B. EVEN IF THIS INTERVIEW SITUATION CONSTITUTED A CUSTODIAL INTERROGATION, THE TRIAL COURT'S FINDINGS THAT MIRANDA WARNINGS WERE GIVEN AND THAT DEFENDANT-APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS AND VOLUNTARILY MADE THESE STATEMENTS ARE NOT CLEARLY ERRONEOUS AND SHOULD NOT BE DISTURBED.

The trial court judge, at the conclusion of the presentation of the evidence, pursuant to the defendant's motion to suppress these statements, held that these statements were admissible. He explicitly ruled that a Miranda warning was given and that defendant voluntarily made these statements. (Tr. pp. 38-39, App.22-23) . A judgment that defendant-appellant knowingly and intelligently waived his Miranda rights is implicit in this holding.

Great deference is paid to the findings of the trial court judge in an appellate review of a pre-trial suppression hearing.

Unless the judge's conclusions were "clearly erroneous" the Court of Appeals has held that the findings should stand. United States v. Duvall, 537 F.2d 15, 23 (2d Cir. 1976). This deference extends to both findings of fact, including credibility issues, and conclusions of law, such as the voluntariness of a defendant's statements. Duvall, 537 F.2d at 23; Hall, 421 F.2d at 546; United States v. Anderson, 394 F.2d 743 (2d Cir. 1968).

The correctness of the trial court's holding in part depends on the burden of persuasion on the prosecution for each element establishing the admissibility of in-custody statements. The prosecution has a "heavy burden" to show that warnings were given and that defendant knowingly and intelligently waived his rights. Miranda, 384 U.S. at 475-477, 86 S.Ct. at 1628-1629. However, the voluntariness of any statements made after warning and waiver can be established by a mere preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627, 30 L.Ed. 2d 618 (1972).

Contradictory testimony was introduced as to whether the Customs agents warned defendant-appellant of his rights prior to questioning him. (Tr. pp. 23, 25, 29 - 31, App.7, 9, 13-15). The trial judge, taking into consideration the credibility and demeanor of the witnesses, concluded a Miranda warning was given. (Tr. p. 38, App. 22). Defendant-appellant makes reference to this conflict in his appellate brief but does not put it in issue. (Appellant's Brief, p. 6).

The trial judge did not explicitly rule on the issue of whether defendant-appellant knowingly and intelligently waived his rights, although such a finding is implicit in the denial of defendant's motion to

suppress. In Miranda the Supreme Court touched on the issue of waiver:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by his statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. (384 U.S. at 475, 86 S.Ct. at 1628). (emphasis added)

The language suggests both that not all express statements are waivers, and that a waiver could but need not be expressed explicitly, although some affirmative conduct is required. In United States v. Masullo, 489 F.2d 217, 221 (2d Cir. 1973), the Court held that following Miranda warnings defendant's admissions alone, without any express statement, constituted a waiver of his right to remain silent. See also United States v. Hilliker, 436 F.2d 101 (9th Cir. 1970), cert. den., 401 U.S. 958, 91 S.Ct. 987, 28 L.Ed. 242 (1971).

Defendant-appellant waived his right to remain silent in the present case. He was given the Miranda warnings and then chose to make inculpatory statements, as in Masullo. Alternatively, he stated that he was willing to answer questions put to him by the Customs agents pertaining to the firearms found in his car. (Tr. p. 31, App. 16). Waiver of his Fifth Amendment rights is easily inferred from this statement. Indeed, this

statement parallels language in Miranda: "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." 384 U.S. at 479, 86 S.Ct. at 1630 (emphasis added).

Although his headnote is framed more broadly, defendant-appellant in essence challenges only the existence of a waiver. (Appellant's Brief, pp. 8 - 9). The question of whether such waiver was knowing and intelligent was not discussed at all during consideration of the suppression motion nor was any evidence introduced. In light of the foregoing, the trial court's implicit ruling that defendant-appellant waived his rights is not clearly erroneous and should be permitted to stand.

The prosecution needed to establish the voluntariness of defendant-appellant's statements, both his waiver and his admissions, by a preponderance of the evidence. An evaluation of the totality of the circumstances is used to decide the voluntariness issue. United States ex rel. Ward v. Mancusi, 414 F.2d 87 (2d Cir. 1969). No evidence at all was introduced demonstrating official overbearing. Only two agents conducted the interview. (Tr. p. 37, App. 21). Their discussion with

Zogbi was polite and without any threats. (Tr. p. 31, App. 15). The questioning was intermittent and lasted only forty-five minutes to one hour. (Tr. p. 37, App. 21). The interview began around 12:15 A.M., and there are no indications that Zogbi was in poor physical condition. (Tr. pp. 36, 33, App. 20, 17). In fact, he may have been supplied with coffee. (Tr. p. 37, App. 21). Zogbi never sought to end the interview. (Tr. p. 37, App. 21). On this evidence, the trial court's finding of voluntariness is not clearly erroneous.

POINT II

THERE IS NO SHOWING THAT THE DEFENDANT'S
RIGHTS AGAINST SELF-INCRIMINATION WERE
CONTRAVENED OR THAT THE EVIDENCE INTRODUCED
AT THE TRIAL WAS INSUFFICIENT OR UNTRUSTWORTHY

The record contains considerable testimony showing that the defendant Daniel B. Zogbi was familiar with the regulations concerning the importation of firearms and knowingly imported a firearm, in violation of Title 18, United States Code, Sections 922(1) and 924(a). United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, 443 F.2d 463 (2d Cir. 1971), cert. denied, 404 U.S. 983, 92 S.Ct. 447, 30 L.Ed. 2d 367.

In Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974), the court said:

When involuntary statements or the right against self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: protection of the courts from reliance on untrustworthy evidence. Cases which involve the self-incrimination clause must, by definition, involve an element of coercion, since the clause provides only that a person shall not be compelled to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect's insistence on innocence. (417 U.S. at 448, 94 S.Ct. at 2366).

The present case contains no hint that defendant's statements to the Customs agents were untrustworthy. The record contains considerable testimony corroborating defendant's statements and establishing that he was familiar with regulations concerning the importation of firearms and knowingly imported a firearm, in violation of Title 18, United States Code, Sections 922(1) and 924(a). Agents Davis and Ducuennois both testified that they discussed the applicable law with defendant on July 25, 1976. (Tr. pp. 74-78, 83, 88-90, App. 29-33, 36, 41-43). Both these agents confirmed that at this time defendant had in his possession the receiver barrel and other parts of a Thompson semi-automatic

machine gun, serial number 1729. (Tr. pp. 72, 87^{1/}, App. 27, 40). Mr. Trask stated that the defendant on July 27, 1976, brought to him in West Hurley, New York, a receiver and barrel assembly bearing the same serial number. (Tr. p. 48, App. 24). This part was deemed defective, was cut up, and was subsequently seized by Federal agents at West Hurley, New York. (Tr. pp. 49, 50, 132, App. 25, 26, 47). A substitute barrel receiver was inscribed with the same serial number and given to defendant. (Tr. pp. 49-50, App. 25, 26). This barrel receiver was taken from defendant on July 29, 1976, when he attempted to leave the United States. (Tr. pp. 116, 122-123, App. 44, 45, 46).

^{1/} Defendant returned to Canada, taking this weapon with him. (Tr. pp. 81-83, App. 34-36).

CONCLUSION

Wherefore, it is respectfully submitted that the conviction of Daniel B. Zogbi, in the United States District Court for the Northern District of New York, be upheld in all respects.

Respectfully submitted,
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APPENDIX

EXCERPTS FROM TRANSCRIPT OF RECORD.

17

THE COURT: There has been an off the record Conference with the Court from which develops that there is an outstanding undetermined motion to suppress something. Exactly what it is, I don't know, I haven't seen the motion papers. Could I see them? First of all, it was brought to my attention after we impaneled the Jury.

MR. RYAN: Your Honor, I believe this--how the event occurred, I made a motion for discovery--

THE COURT: (Interrupting) Where was the motion, do you have a set of motion papers?

MR. RYAN: No, it was a discovery motion for any--

MR. MCCANN: (Interrupting) These are a copy of the papers that were served on the United States Attorney's Office.

THE COURT: I don't know, I never understood why people didn't put two papers in one instead of two, do you? The only suppression motion you made here, Mr. Ryan, and it is one to suppress certain articles which you don't describe.

MR. RYAN: Well, that motion, Your Honor, has been withdrawn.

THE COURT: You have withdrawn that?

MR. RYAN: Yes.

THE COURT: And you now--but you want to make another motion, do I understand you correctly?

MR. RYAN: At the discovery--I made a motion for any statements that were made. I didn't know if any had been made that would be used at the special term, the motioned term, Mr. French of who represents the Government indicated to me that that type of motion would take place at the time of the trial.

THE COURT: Well, you are the Lawyer in the case, Mr. French isn't advising you how to practice Law, is he?

MR. RYAN: No, I think, Your Honor, if I could perhaps go into when I'm cross-examining the witness--

THE COURT: (Interrupting) It isn't a Jury question ordinarily. I mean, if you want to suppress something, you must make a motion. What motion do you want to make?

MR. RYAN: It concerns the voluntariness of the statements--

THE COURT: (Interrupting) Of what

statements?

MR. RYAN: That the Government is going to use, the statements made by the Defendant.

THE COURT: What statements? You said you discovered them, you ought to be able to identify them.

MR. MCCANN: All the statements that the Defendant made have been provided to opposing Counsel, Your Honor. He made statements at the time of his initial entry on July 25--

THE COURT: (Interrupting) I don't care what they were, I just want to know specifically which ones he wants to suppress and why.

MR. RYAN: Your Honor, in the case history provided me by the Government--

THE COURT: (Interrupting) Mr. Ryan, you are obviously not prepared. I'll take a short recess. Pull your thoughts together, see if you can produce for me exact statements you want suppressed and your grant for a motion and I'll entertain it, perhaps.

(Whereupon a brief recess was taken.)

THE COURT: Alright, Mr. Ryan, have you got a motion set up now?

MR. RYAN: Yes, Your Honor.

THE COURT: Alright, let me here it.

MR. RYAN: In the case history provided by the United States Attorney's Office, the case history refers to an interrogation of Mr. Zogbi at and near Highgate, Vermont. The statement reads, customs--Special Agent Conrad and Kopesky then interviewed Zogbi after advising him of his Constitutional Rights, as on page 5 of the case history. On page 6, there is a statement, Zogbi stated that he had entered the United States on Sunday, July 25, 1976 at the Port of Entry Champlain, New York and had not declared the barrel action to customs, and the 4th paragraph on page--there is the further statement he stated that he left the assault rifle at his residence, then proceeded with Kennedy to Champlain, the Port of Entry, where he didn't declare the receiver to customs, because he "did not want any hassles with customs". Those two statements are the statements I wish to suppress.

THE COURT: On what grounds?

MR. RYAN: Mr. Zogbi has informed me it was late at night, and he has doubts as to the

voluntariness of the statements.

THE COURT: That isn't enough.

MR. RYAN: And as to the question of whether before he made the statements he was read his Constitutional Rights.

THE COURT: He denies, does he? Put him up there, he hasn't got an affidavit, I don't know whether you want to put him up there--

MR. RYAN: (Interrupting) Yes, yes.

THE COURT: But I have to have some factual basis for a motion.

DANIEL ZOGBI,

called as a witness, after having first been duly sworn, testified as follows:

EXAMINATION BY MR. RYAN:

Q. Mr. Zogbi, on or about July 29, did you have occasion to be at or near Highgate, Vermont?

A. Yes, I did.

Q. Is that near the Canadian Border?

A. That is correct.

Q. Approximately what time of the morning or night did you meet customs--special U.S. customs officials?

A. About 12:10 A.M.

Q. Now, did there come a time when you were subsequently

Excerpts from Transcript of Record.

physically taken from the customs station and incarcerated?

A. Yes, there was.

Q. And what time was that, approximately?

A. Basically about 10 or 15 minutes after I was stopped by U.S. Customs. I was taken inside to the front desk where they had me write down a list--

Q. (Interrupting) Okay, but was there a time when you actually left the customs house and was brought to jail or someplace?

A. Yes, Sir.

Q. And what time was that?

A. About 4:30 in the morning.

Q. Okay, now, from 12:10 when you first arrived at the U.S. Customs place until about 4:15 in the morning, when you were incarcerated--

A. (Interrupting) Right.

Q. Did you--were you interviewed by customs agents?

A. Yes, I was.

Q. Now, can you remember if before they asked you any questions they read you your rights, and did they tell you that you could--that any statements you made would be used against you or that you could have a right to call an attorney, did they give you any warning before

they took these statements?

A. No, they did not. What happened is, they took me into the front desk about 15 minutes after I stopped on the primary, and they asked me to write a list of the items I had. Two agents came down, one which was Special Agent Kopesky, and the other was Conrad, and they asked me to go into a small office.

Q. Did they at anytime during the night read you your rights?

A. Only when I was arrested.

Q. Only when--

THE COURT: (Interrupting) After your arrest?

MR. ZOGBI: Right, when--while I was arrested, Your Honor.

Q. When you say arrested, do you mean actually--at 4:15 when you were brought into a patrol car, some sort of a vehicle and transported into a jail?

A. After I was handcuffed by a special agent I was read my rights then.

Q. Was this before or after you made the statements?

A. After I made the statements.

THE COURT: Where did you make the statements, when they first stopped you?

MR. ZOGBI: They told me to go into the front

desk with the parts--

THE COURT: (Interrupting) At the custom station?

MR. ZOGBI: Right, at Highgate Springs, and told me to write a list of the merchandise I had.

THE COURT: Did you do that?

MR. ZOGBI: Yes, I did.

THE COURT: Then what happened?

MR. ZOGBI: Then while I was writing the list up, I just finished--Special Agent Kopesky and Conrad came down the stairs from a room above and they told me to go--I think it was Special Agent Kopesky, told me to go into a small room behind the counter and to sit there and wait. and they came a few minutes later and started questioning me about the parts, and they got to the receiver, they said where did you get the receiver from, and most of the questions were basically concentrated around the receiver, where I got it from, and how it came to be in my possession at that time.

THE COURT: And you told them?

MR. ZOGBI: I told them.

THE COURT: What did you tell them?

Excerpts from Transcript of Record.

MR. ZOGBI: I told them that I had taken the receiver from Montreal, I had--I told them the incident, what happened with the two riffles that morning on July 25th in the morning, and how I was refused entry with them. So, I went back to Montreal and left the riffle at home and took the Thompson apart and brought back only the barrel action receiver with me, then I went through customs, and that the customs--the primary--he had inspected--he looked into my trunk and he saw it, it was beside a CB set I had, and I entered into New York and went to West Hurley, where I replaced the receiver to have it repaired with the warranty, and I took it back to Montreal, and that is the night I was arrested on the 29th.

Q. That is all I would have to offer, that to the best of your recollection, before you were interviewed, before you made certain statements about your entry into the United States, you weren't advised of any rights?

A. As far as I can--the only time I was read my rights was--I believe Richard Mayer (phonetic spelling), when I was arrested around 4 o'clock in the morning, 4:15 in the morning.

MR. RYAN: That is all I have, Your Honor.

Excerpts from Transcript of Record.

THE COURT: Cross-examination?

EXAMINATION BY MR. MCCANN:

Q. You were examined by Special Agent Kopesky of the United States Customs. Did you also make the statements that you didn't declare the receiver barrel originally because you didn't want any hassles with United States Customs?

A. I didn't make the statement exactly that way. Do you want me to go into detail--

THE COURT: (Interrupting) I'm not concerned with what he said, I am concerned if there was any illegality here, Mr. McCann, at this point.

MR. MCCANN: I have no questions then of this witness.

THE COURT: Alright, Okay.

MR. MCCANN: Your Honor, at this time, the Government would like to produce a witness.

THE COURT: What do you say about the sufficiency of what he has said?

MR. MCCANN: I--he stated--was insufficiency stated on the record.

THE COURT: I heard the statements, why is it insufficient?

MR. MCCANN: It was the customs search and

Excerpts from Transcript of Record.

inspection upon entry to the United States which the Defendant has testified to, he stated he can remember--he doesn't remember his rights being given to him. I feel that its insufficient at this time. The law is quite explicit that there is no need to show probable cause.

THE COURT: I am--we are not talking about a search, we are talking about an interrogation.

MR. MCCANN: He was questioned, Your Honor, concerning the merchandise he had in his automobile at the time he was stopped at the border.

THE COURT: And you say there is no need to give any warning--

MR. MCCANN: (Interrupting) I can produce Mr. Kopesky's testimony--

THE COURT: (Interrupting) I don't care what he says, we are talking about his testimony--

MR. MCCANN: (Interrupting) Are not given at the border.

THE COURT: Not whether--what--

MR. MCCANN: (Interrupting) At the time he was placed under arrest, he has to be given his rights.

Excerpts from Transcript of Record.

THE COURT: When was he placed under arrest?

MR. MCCANN: According to his own testimony someplace around 4:00, 4:30 A.M. the agent placed him under arrest.

THE COURT: We will reserve--let me hear--

FRANK KOPESKY,
called as a witness, after having first been duly sworn, testified as follows:

EXAMINATION BY MR. MCCANN:

Q. Mr. Kopesky, how are you employed?

A. I'm a Special Agent with the United States Treasury Department, United States Customs Service.

Q. The evening of July 28, 1976, in the early morning hours of July 29, 1976, were you so employed?

A. Yes, I was.

Q. Where were you employed?

A. At Highgate Springs.

Q. On that evening, did you have an opportunity to talk with the Defendant in this case Daniel Zogbi?

A. Yes, I did.

Q. Can you identify the Defendant Daniel Zogbi?

A. Yes, I can, he is wearing a tan suit, sitting between the two gentlemen at that table.

MR. MCCANN: Let the record reflect that the

witness has been identified.

THE COURT: Yes. Did you say Highgate, Vermont?

MR. KOPESKY: Highgate Springs, Vermont.

Q. Approximately what time did you interview Defendant Daniel Zogbi?

A. Approximately a quarter past twelve, that is midnight on July 29th.

Q. Prior to the interview, did you advise the Defendant of any of his rights as required by law?

A. Yes, I made him aware of his Constitutional Rights.

Q. Would you tell the Court, please, how you advised the Defendant of his rights?

A. I read them off of a card that I carried.

Q. Do you have that card with you now?

A. Yes, I do.

Q. Could you show that card to the Court, please?

MR. MCCANN: Could we have this marked Government's Exhibit "7"?

Q. I show you Government's Exhibit "7" for identification, can you identify that?

A. Yes, this is the card that I carry with me at all times, and it is what I use too when I interview people to make them aware of their rights.

Q. Did you have that card with you at 12:15 A.M. on July 29, 1976 at Highgate Springs, Vermont?

A. Yes, I did.

Q. Did you have that card with you when you advised the Defendant Daniel Zogbi of his rights?

A. Yes, I did.

Q. Would you tell the Court, please, exactly what you advised the Defendant of?

A. "Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in Court or other proceedings. You have the right to consult an attorney before making any statements or answering any questions, and you may have him present with you during the questioning. You may have an attorney appointed to you by the United States Commission, or the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer questions now, with or without a lawyer, you still have the right to stop the questioning at anytime or to stop the questioning for the purposes of consulting a lawyer. However, you may waive the right to advice of Counsel, and your right to remain silent, and you may answer questions and make a statement

without counseling a lawyer, if you so desire".

Q. Did the Defendant respond to your questions after you read the Defendant his rights as you have just stated, did the Defendant make any statements to you?

A. Yes, he asked me if there was any problem.

Q. Did the Defendant indicate to you that he understood his rights?

A. Yes, he did.

Q. And--

THE COURT: (Interrupting) What did he say?

Q. What did the Defendant say?

A. The Defendant stated--at first asked if there was any problem, and I told him that we didn't know at the time, but that we would like to question him about the merchandise in his possession. He said that he would be willing to answer questions pertaining to the merchandise.

Q. Did you ask any questions of the Defendant prior to advising him of his rights as you have just read?

A. No we did not.

Q. Was there anybody else present when you interviewed the Defendant?

A. Yes.

Q. Who was present?

A. Special Agent Conrad.

Q. Is he a Special Agent with the United States Customs?

A. Yes.

Q. If you know, do you know where he is today?

A. Presently he is a Special Agent--Conrad is assigned to the Office of Special Agents in charge at Laredo, Texas.

MR. MCCANN: I have no further questions of this witness, Your Honor.

THE COURT: Cross-examination?

MR. RYAN: Thank you, Your Honor.

EXAMINATION BY MR. RYAN:

Q. In the early morning hours of July 29, did there come a time when Mr. Zogbi was transported from the customs house to a detention facility?

MR. MCCANN: I object to this question, it is out of the scope of direct examination and not concerned with whether the Defendant was properly advised of his rights at the interview.

THE COURT: Sustained.

Q. Do you recall where he was, Mr. Zogbi was advised of his rights?

A. Pardon?

Q. Where--

A. (Interrupting) Where was he advised of his rights?

Q. Yes?

A. At the border crossing station at Highgate Springs, Vermont, in a room on the customs side of the station and towards the back.

Q. Had he made any statements to you prior to this time, that he had been up for most of the night and was very tired, did he make any statements as to his physical condition at this time?

A. Not that I can recall.

Q. Did he make any statements to you before you read him his rights?

A. No.

Q. Any statements pertaining to any items he might have in his car?

A. No, he did not.

Q. You stated he was willing to testify as to materials that he possessed?

THE COURT: He wasn't testifying.

Q. Willing to make a statement as to items he had in his possession? Can you state from your own knowledge what the initial purpose of the conversation was, what items it concerned?

MR. MCCANN: Again I object, Your Honor,

Excerpts from Transcript of Record.

that is irrelevant at this point.

THE COURT: I don't think so. I really don't think your relevance is too good either, except it is a little out of sequence. He is entitled to-- that these statements were not made voluntarily.

A. Could you repeat the question?

Q. Okay, what material items, physical goods were the initial subject of the conversation with Mr. Zogbi?

A. A barrel action for a Thompson semi-automatic carbene.

Q. Were you summoned to the border at Highgate Falls, Vermont?

A. No, I was not, I was stationed at Highgate Springs, Vermont.

Q. And did you have cause to inspect the car or see that the car that Mr. Zogbi was riding in was inspected?

A. I'm not an inspector, I don't make inspections.

Q. Do you know if it was--of your own knowledge if the car was inspected?

A. Yes.

Q. And were you as a result of this inspection called, summoned to the border station?

A. I was already at the station.

Q. Were you summoned by inspectors?

A. Yes.

Q. And was there a purpose stated to you as to why Mr. Zogbi--why the case should be referred to you?

A. Yes.

Q. Were there any items found in the car?

THE COURT: You can put leading questions, you are cross-examining, it might speed this thing, and it might help me to find out what your driving at here.

MR. RYAN: Yes, Your Honor, I'm sorry.

Q. Were there any other items other than the Thompson gun found in the car?

A. Yes.

Q. What were they?

A. Various gun parts, in particular I can recall a 45 caliber barrel, a magazine for an AR 15 semi-automatic riffle--

Q. (Interrupting) So, certain guns and firearms were found in the car?

A. Yes.

Q. And isn't that the reason why you questioned Mr. Zogbi, to find out what the purpose of all these guns that were in the car, in the back of his car, isn't that the topic of your conversation, the number of guns in

the back seat or the trunk or wherever they were?

A. Yes.

THE COURT: Mr. Ryan, could you come up here?

Q. Did you--when Mr. Zogbi was in the room, who else was in the room, I know an agent was in the room, was there anybody else in the room when you read him his rights?

A. No.

Q. Now, you stated his response was, is there a problem?

A. Yes.

Q. So, initially, he did not give an affirmative response that he understood his rights and would waive--

A. (Interrupting) Not that I can recall.

Q. Alright, now, could you state after he initially said, is there a problem, what then did you say?

A. I stated that we did not know at this time, we wanted to ask him some questions pertaining to the merchandise in his possession and would he be willing to answer questions pertaining to this merchandise.

THE COURT: What time of night was this?

MR. KOPESKY: That would have been approximately 15 minutes past midnight on the morning of the 29th.

THE COURT: How long did you have him there that night?

MR. KOPESKY: He was interviewed intermittently for approximately 45 minutes to an hour, but not continuously.

THE COURT: Did you give him anything to eat or drink?

MR. KOPESKY: Possibly coffee, there was no food available up there.

THE COURT: Is there coffee up there?

MR. KOPESKY: Yes, I don't know for sure if coffee was given or not.

THE COURT: Did he ask for anything?

MR. KOPESKY: Not that I can recall.

THE COURT: How many officers--

MR. KOPESKY: (Interrupting) There was one other Special Agent besides myself.

THE COURT: Just two?

MR. KOPESKY: Yes.

THE COURT: Did he at anytime indicate that he didn't want to talk to you?

MR. KOPESKY: Not that I can recall.

MR. RYAN: If I might, Your Honor?

Q. Did you make any statements to the Defendant Zogbi as to the appropriateness in making statements, in telling you something, did you ever state, for instance, it

would be good for you if you tell us what you know?
Did you ever ask him questions, was your interview
prefaced with this?

THE COURT: You're asking him forty
questions, ask him one. You don't let him
answer, did you do this, did you do that, did you
do this--get prepared to cross-examine, we will
see you at 2:15.

(Whereupon a brief recess was taken).

THE COURT: Proceed.

MR. RYAN: I have no more questions.

THE COURT: No more questions, the
Government rests?

MR. MCCANN: The Government rests.

THE COURT: Do you rest?

MR. RYAN: Yes.

THE COURT: I deny the motion to suppress.
The evidence goes contradicted. The credible
evidence having been observed, the witness--it
seems clear that Miranda warning was given.
There is no reason--so, at the threshold, there
can't be any question in my mind, I find that
Miranda warning were given accepting the
testimony, but even if there were not, there is

Excerpts from Transcript of Record.

no question the Miranda Rule only applies to interrogations when a defendant is in custody, and there can be no question at the time of the initial interviews here at the office, at the border station there in Champlain, there in Vermont where he was taken, there was no custody at that time, that followed later, and carrying still a step further, there is nothing showing that any of this was at all involuntary in any way. There is not the slightest hint of coercion anywhere in the testimony of the defendant or any circumstances showing overreaching or overbearing his will in anyway. I find, therefore, that the statements were made after a fair warning and after a Miranda warning. They were made freely and voluntarily, they were not the product of coercion and are admissible, and I deny the motion. These will constitute the Court's findings of fact and conclusion of law. Proceed, bring in the Jury. In making these rulings, I want the record to note we are bypassing questions concerning the untimeliness of the motion without in anyway producing the Government's motion in anyway. Alright, Mr. McCann?

* * * * *

Q. I show you Government Exhibit "2" for identification consisting of parts "2A", "2B", "2C" and a bag consisting of various parts which is marked "2C" and "2D"?

A. This is the defective receiver and the internal portions of the top parts.

Q. How are you able to identify that as the defective receiver brought down to you?

A. This particular receiver is by serial number 1729, and knowing of it right now as far as observing it.

Q. Was that receiver barrel assembly manufactured by Auto Ordinance Corporation?

A. We manufactured this particular one.

MR. MCCANN: At this time, Your Honor, I move for Government's Exhibit "2A" through "E" marked in evidence.

MR. RYAN: I have no objections.

THE COURT: Received.

Q. Would you tell us then what transpired with Mr. Zogbi?

A. When he came down to see me, what I did was tell him to drop off the defective barrel receiver at my Auto Ordinance Corporation where they would take care of it, repair or replace it, and in the meantime, he came down to my office.

Q. Were you able to determine what was defective about that

barrel receiver?

A. I personally--no, I had no knowledge at the time other than from my shop foreman who advised me that it should be repaired or replaced.

Q. Was it repaired?

A. We decided because of the time, it had to have an outside external finish redone, which would take several hours, we decided to replace it rather than repair it.

Q. Do you know, Mr. Trask, if that barrel receiver was operational at the time Mr. Zogbi brought it into your office on July 27, 1976?

A. I know, I personally don't know.

Q. And did you on that date issue Mr. Zogbi a new barrel receiver?

A. Right, upon my instructions, I told them to replace the one barrel receiver with another using the same serial number.

Q. Are you able to identify the barrel receiver which was issued to Mr. Zogbi on that day?

A. Yes, I can.

Q. Can you tell the Jury, please, how you were able to identify that?

A. We took a barrel receiver right out of the assembly

and put the exact same serial number on in order to save in any further bookkeeping, since that number is already issued to it.

Q. And at that time, what did you do with Government's Exhibit "2"?

A. The old barrel receiver--the next day we were advised by the Customs Department that they wanted to take it from us, so we torched it as we normally would and turned it over to them, and that was a day or two later.

Q. At this time, I show you Government's Exhibit "3" for identification. Could you identify that?

A. This is the replacement barrel receiver.

Q. How are you able to identify that as the replacement barrel receiver?

A. First, this is our product, our company name is on this, secondly, it is the exact same serial number as the defective one.

Q. What is the serial number that appears on that?

A. 1729.

MR. MCCANN: At this time, Your Honor, I move for Government's Exhibit "3" into evidence.

MR. RYAN: No objection.

THE COURT: Received.

* * * * *

United States--what--don't you tell them what they need when they are coming into the United States?

MR. DAVIS: I also told Mr. Zogbi any merchandise had to be declared upon entering the United States.

Q. I show you Government's Exhibit "2" which is in evidence, are you able to identify this?

A. Yes, Sir.

Q. Could you tell us what it is, please?

A. It is the receiver barrel and other internal parts to a Thompson semi-automatic machine gun.

Q. How are you able to identify that?

A. By the serial number.

Q. What is the serial number?

A. 1729.

Q. Did the defendant have that particular exhibit in his possession on July 25, 1976, when you were interviewing him at the Port of Entry at Champlain, New York?

A. He had a receiver barrel and all the internal parts and the stock with the serial number 1729.

THE COURT: Where did he have it?

MR. DAVIS: At the Port of Entry, Champlain, New York.

Excerpts from Transcript of Record.

THE COURT: Where, at what point of entry at Champlain, where did the defendant have it?

MR. DAVIS: Inside the Port of Entry.

THE COURT: Where, in his car, in his person, where?

MR. DAVIS: Inside the building.

THE COURT: They weren't in his possession then, were they?

MR. DAVIS: Yes, Sir, he had control of them.

THE COURT: Weren't they on your desk?

MR. DAVIS: No, Sir.

THE COURT: Were they on the desk of the customs--

MR. DAVIS: (Interrupting) They were laying on the desk, and Mr. Zogbi was standing beside the desk.

THE COURT: But there were two officers there with him, weren't there?

MR. DAVIS: I beg your pardon?

THE COURT: Weren't there two customs officers there, you and someone else at that time?

MR. DAVIS: Yes, Sir.

THE COURT: Strike his possession, he can't

tell a possession, it is a question of fact, bring out the facts, Mr. McCann.

- Q. Did the defendant indicate to you what he had in his possession when he crossed the United States on the Port of Entry?

THE COURT: Sustained, the question is bad in form. I'm sorry, I don't like to take over here, and you are not to conclude that I've got any point one way or the other, but I have a job here to do in this criminal case, and that is to make sure that the rules are followed. The question is bad.

- Q. Did the defendant make any statements to you concerning the possession of Government's Exhibit "2" at the time you interviewed him on July 25th?

A. Yes, Sir.

- Q. What were those statements?

A. Mr. Zogbi told me he brought this particular weapon into the United States, he had declared them on his primary inspection, and also had declared them to the customs inspector on the second inspection.

- Q. Did you advise Mr. Zogbi whether he could import or bring into the United States Government's Exhibit "2"?

A. I advised Mr. Zogbi that the circumstances

surrounding it would be looked into.

- Q. Did you advise Mr. Zogbi as to the rules and regulations or the laws involved in bringing Government's Exhibit "2" into the United States?

A. Yes.

- Q. What did you advise him?

THE COURT: Sustained, it is immaterial. This is after they were brought in, as I understand it.

MR. MCCANN: No it isn't, Your Honor, may I approach the bench?

THE COURT: No. If you represent that it was before they were brought in, go ahead, answer it.

MR. MCCANN: The witness answered the question, Your Honor, yes.

- Q. What did you explain to the defendant concerning the importation of Government's Exhibit "2"?

A. That it had to be declared, number 1, number 2, that it was the legality of bringing it into the country, into the United States would be checked, and he would be advised.

- Q. Did you advise Mr. Zogbi whether he could in fact import that weapon into the United States?

A. At one point, yes.

Q. What did you advise him?

THE COURT: Let me ask you, had he crossed the border at this time when you gave him that advice?

MR. DAVIS: Yes, Sir.

THE COURT: That he was in the United States when you told him, is that right?

MR. DAVIS: Yes, Sir.

Q. What did you advise Mr. Zogbi, would you continue?

A. That any guns--

THE COURT: (Interrupting) How is this material, he has already brought it into the country.

MR. MCCANN: It is our intention to prove by the testimony of the agent that the defendant was advised at this time that he could not possess this or bring this weapon in the United States, that the defendant did in fact leave the United States and return with the weapon--

THE COURT: (Interrupting) Alright.

Q. Would you continue, Mr. Davis, as to what you advised the defendant, Mr. Zogbi?

A. That any importation of any items had to be declared and under the proper circumstances, certain

paper work would have to be made out by the usage of a customs broker.

Q. Did Mr. Zogbi make any statements to you concerning Government's Exhibit "2"?

A. Yes, Sir.

Q. What statements did he make concerning Government's Exhibit "2"?

A. Mr. Zogbi said he was returning it to the manufacturer because it supposedly was malfunctioning.

Q. Did he tell you how it was malfunctioning?

A. Yes, Sir.

Q. What did he say?

A. He said that it was infrequently jamming.

Q. Did Mr. Zogbi say anything else to you at that time?

A. Mr. Zogbi also told me that he didn't need the services of the customs broker.

Q. Did he make any other statements to you?

A. He also indicated that he did not have--Mr. Zogbi did not have an attorney to set up his distributing business in Canada, had no help other than his own.

Q. Did he make any further statements to you?

A. He also said, Mr. Zogbi also said he started the business on a \$6,000.00 loan.

MR. RYAN: Objection. I fail to see the

Excerpts from Transcript of Record.

relevancy of this.

THE COURT: Will Counsel come up here?

(Whereupon Counsel approached the bench.)

Q. Agent Davis, did you advise Mr. Zogbi at anytime, that under customs laws and rules and regulations that he could not import or bring into the United States Government's Exhibit "2"?

A. Would you repeat that question, please?

THE COURT: Did you tell him he couldn't bring it in under the customs laws?

MR. DAVIS: Yes, Sir.

Q. What did Mr. Zogbi say to that?

A. He wasn't very happy with it.

Q. Would you state, please, what he said?

MR. RYAN: Your Honor, I would ask that that be stricken.

THE COURT: Yes, strike it out. What did he say, don't you understand english, nobody asked you whether he was happy or unhappy.

Q. Would you tell us what he said, please?

A. I don't remember, I'm sorry.

Q. Did you have any further conversations with Mr. Zogbi?

A. Yes, Sir, about fifteen or twenty minutes later.

Q. Can you tell us and where did those conversations take

* * * * *

Excerpts from Transcript of Record.

A. Two weapons.

Q. Two weapons, now, were these guns assembled or unassembled?

A. Assembled.

Q. Now, Government's Exhibit "2" that you are holding is an unassembled item, is that correct?

A. Yes, Sir.

Q. So, you cannot--can you identify the parts, all the parts that you hold in your hand now as being assembled on that gun that was at the United States Customs House, a Thompson gun?

A. Do I know for a fact that all of these were a part of this?

Q. Yes?

A. No, Sir I do not.

Q. After your initial questioning of Mr. Zogbi, what did you advise him, did you advise Mr. Zogbi anything as to what he could do?

A. Yes, that he would have to take the two weapons back to Canada.

Q. And do you know if he did return to Canada?

A. I personally saw Mr. Zogbi and his friend get into Mr. Zogbi's vehicle, turn around, and go through Canadian Customs.

THE COURT: Go through what?

MR. DAVIS: Canadian Customs.

THE COURT: You observed that?

MR. DAVIS: I saw him get into the line.

THE COURT: Did you see him cross the border and go back into Canada?

MR. DAVIS: I don't know exactly where the Canadian Port of Entry is other than being South of it, but he was in line.

Q. And you state he came back in about fifteen minutes and asked if he could leave the guns there?

A. Yes, Sir.

Q. And you responded that he could not, is that correct?

A. Correct.

Q. Then what did Mr. Zogbi do?

A. He turned around and started walking towards the Canadian side.

Q. And did you observe Mr. Zogbi walking back toward Canadian Customs?

A. For a period of time, yes.

Q. Do you know if you saw him enter into Canada?

A. I don't know where the physical border would have been in relation to where he would have been, no.

THE COURT: Well, in any event he didn't

come into the United States?

MR. DAVIS: No, Sir.

Q. What type of advice did you give him, if any, as to the importation of goods into the United States such as the instrument--

A. (Interrupting) They had to be--all items had to be declared.

Q. All items?

A. Definitely.

Q. When you come into the United States?

A. Yes, Sir.

Q. Now, do you know of your own knowledge if when Mr. Zogbi came into the United States the initial time whether he declared these guns?

A. Do I know for a fact?

Q. Or from your investigation?

A. Yes, Sir.

Q. Yes, and what is the answer?

A. He did.

Q. He declared them? Did you see Mr. Zogbi at anytime that day?

A. Just the two times.

MR. RYAN: I have no more questions, Your Honor.

Excerpts from Transcript of Record.

THE COURT: What date did all of this take place that you are testifying about?

MR. DAVIS: July 25, 1976.

THE COURT: Alright.

MR. MCCANN: The Government has no questions.

THE COURT: You are excused.

MR. MCCANN: The Government would like to call Special Agent Paul Ducuenoes.

PAUL DUCUENOE S,
called as a witness, after having first been duly sworn, testified as follows:

EXAMINATION BY MR. MCCANN:

Q. Would you state your name for the Jury, please?

A. Yes, it is Paul J. Ducuenoes.

Q. Where are you presently residing?

A. Plattsburgh, New York.

Q. How are you employed?

A. I am employed as a Special Agent by the United States Treasury Department of Alcohol Tobacco and Firearms in Plattsburgh.

Q. How long have you been so employed?

A. Seven years and four months.

Q. Would you tell the Jury, please, the nature of your

duties as a Special Agent with Alcohol Tobacco and Firearms?

A. Yes, Sir, I am a Criminal Investigator with that Bureau.

Q. What do your duties involve as a Criminal Investigator?

A. We are in charge with the investigations and enforcements of various laws in the United States, particularly relating to firearms and explosives.

Q. What is your present duty station?

A. Plattsburgh, Sir.

Q. And on July 25, 1976, where were you stationed?

A. Plattsburgh, New York.

Q. And does your duty station cover the Port of Entry in Champlain, New York?

A. Yes, it does.

Q. I call your attention to July 25, 1976, were you called to the Port of Entry in Champlain, New York?

A. Yes, I was.

Q. What time were you called?

A. I was called telephonically 2 A.M.

Q. What time did you arrive at the Port of Entry at Champlain, New York?

A. About 10 A.M.

Q. When you arrived, did you have occasion to meet with

Excerpts from Transcript of Record.

one Daniel Zogbi?

A. Yes, I did.

Q. Are you able to identify the Defendant, Daniel Zogbi?

A. Yes, I am.

Q. Would you identify the defendant, please?

A. He is seated at the second table in the beige colored suit.

MR. MCCANN: Let the record reflect that the witness has identified the Defendant Daniel Zogbi.

THE COURT: Yes.

Q. Would you tell us, please, why you were concerned with Mr. Zogbi on the 25th of July?

A. I was advised by United States Customs that Mr. Zogbi was attempting to import two firearms into the United States, and I was requested to respond and discuss the importation of these weapons with Mr. Zogbi.

Q. Would you describe, if you know, the weapons that were attempted to be imported at that time by Mr. Zogbi to the United States?

A. Yes, Sir, I examined the two weapons that were presented for importation. The first one was a Thompson semi-automatic carbeen, 45 caliber, serial

number 1729. The second one was a Frabrick (phonetic spelling) National Assault Rifle.

Q. I show you at this time Government's Exhibit "2", this is Government's Exhibit "2" in evidence consisting of parts "A" "B" "C" and "D"; are you able to identify what these are?

A. Yes, Sir, I believe that they are parts of a Thompson semi-automatic carbeen and the 45 caliber, and the serial number affixed to the part of the receiver is serial number 1729.

Q. Okay, concerning that weapon, did you have a discussion with Mr. Zogbi concerning the importation or bringing into the United States of Government's Exhibit "2"?

A. Yes, Sir, I did.

Q. Would you tell us, was there anybody else present when you had that discussion?

A. Yes, Sir, Mr. Larry Davis, a United States Customs Agent was present during the conversation.

Q. Was anybody else present?

A. Yes, there were various other customs agents present during parts of the conversation.

Q. Could you tell us what that conversation consisted of, please?

A. Yes, Sir, Mr. Zogbi stated that he was initially in route to a gun show in Schenectady, New York, where he intended to have a scope or attempt to have a scope mounted on the Frabrick National Rifle. He further stated that the Thompson 45 caliber carbeen was the property of an individual by the name of Carrier from Quebec. He stated he sold the gun to Mr. Carrier and he was taking the Thompson carbeen to Auto Ordinance--

Q. (Interrupting) Did he make any further statements to you concerning Government's Exhibit "2"?

A. He stated that the reason he was taking it to Auto Ordinance or Newmark Arms is there was some problem with the weapon feeding the bullets going into the weapon from the magazine, and that he was taking it down to Auto Ordinance Corporation to have them examine it.

Q. Did you have any discussions with Mr. Zogbi concerning Government's Exhibit "2" and whether he could bring it into the United States?

A. Yes, I did.

Q. What were those discussions?

A. I advised Mr. Zogbi that under the Prohibition of The Gun Control Act of 1968 that a weapon could not

Excerpts from Transcript of Record.

simply be introduced into the United States in the manner that he was attempting to do that. I told Mr. Zogbi that the method by which a weapon is brought into the United States is by filing an ATF Form 6 application for importation, and that upon the approval of this application for the importation of a firearm, that the approved application would serve as the authority by which the firearm could be brought into the United States legally.

Q. Did you have any discussions with Mr. Zogbi concerning the definition of a weapon under the Gun Control Act of 1968?

A. Yes, I did.

Q. Could you tell us what those discussions were, please?

A. During the course of the conversation, I stated to Mr. Zogbi that the definition of a firearm is contained in the Gun Control Act of 1968 for the purposes of the discussions that we were having at that time. It was any weapon capable of discharging a projectile by the action of an explosive or the frame or receiver thereof. Upon advising Mr. Zogbi of that definition, he indicated to me that he understood what I was saying and he was aware of that.

Q. How did he indicate to you--

A. (Interrupting) I asked Mr. Zogbi if he understood how I had defined a firearm and he indicated that he did, he indicated with an answer of yes.

Q. Did Mr. Zogbi make any other statements to you at that time?

A. Yes, he did.

Q. What statements did he make to you at that time?

A. I don't completely understand the question.

Q. Concerning Government's Exhibit "2", did Mr. Zogbi make any other statements to you on July 25, 1976?

A. Not to the best of my recollection at this time, Sir.

Q. Did you ask Mr. Zogbi if he understood the requirements of an ATF Form 6 for importing Government's Exhibit "2"?

A. I asked Mr. Zogbi if he understood the requirements as I explained them to him, and he indicated by answering yes that he did. I furnished Mr. Zogbi with my office telephone number and advised him that if he had any questions concerning the laws of the United States, in particularly the Gun Control Act or importation matters, that he should in fact contact me and I would be happy to answer those questions.

* * * * *

Excerpts from Transcript of Record.

A. Yes, Sir.

Q. Who was in the automobile, as you know?

A. Mr. Kennedy.

Q. When Mr. Zogbi came to the primary line, did he make any statement to you?

A. Yes, Sir.

Q. What did Mr. Zogbi say?

A. He told me he had been going into Canada, but had been refused admission to Canada until he could go through a broker the next morning.

THE COURT: Until what?

MR. DEMETRIUS: He could go through a broker the next morning.

Q. As a result of your conversations with Mr. Zogbi, did you inspect the trunk of Mr. Zogbi's vehicle?

A. Yes, Sir.

Q. And when you inspected the trunk of Mr. Zogbi's vehicle, was Government's Exhibit "3" which I now show you in the trunk of that vehicle?

A. Yes, Sir.

Q. Can you tell us how you know that Government's Exhibit "3" was in the trunk of that vehicle?

A. Yes, Sir, by my initial, right here.

Q. Then did you place your initial on Government's

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Excerpts from Transcript of Record.

right to remain silent, and you may answer questions or make a statement without consulting a lawyer, if you so desire."

Q. Did Mr. Zogbi make any statements to you after you read him his rights?

A. Yes, he did.

Q. Did he indicate that he understood his rights?

A. Yes, he did.

Q. How did he indicate he understood his rights?

A. Let me back track a bit, he asked me if there was a problem, and I indicated to Mr. Zogbi that I was not sure, but that we would like to ask him some questions pertaining to the merchandise, and would he be willing to answer questions.

Q. And did Mr. Zogbi make any statement at that time?

A. Yes, he said he would be willing to answer questions pertaining to the merchandise in his vehicle.

Q. I now show you Government's Exhibit "3", can you identify Government's Exhibit "3"?

A. Yes, I can.

Q. Could you tell the Jury, please, how you are able to identify that Government's Exhibit "3"?

A. Yes, by the serial number 1729, and my initials,

and the date which I scratched into the receiver here.

Q. When did you scratch your initials into the receiver?

A. In the early morning hours of July 29, 1976.

Q. And what date appears there that you have scratched into the receiver?

A. 07/29/76.

Q. And you stated you wished to question Mr. Zogbi about merchandise, is Government's Exhibit "3" what you wished to question Mr. Zogbi about?

A. Yes.

Q. Did you ask Mr. Zogbi any questions about Government's Exhibit "3"?

A. Yes, I asked him where he had been and where he was going with the barrel receiver in his possession.

Q. What did Mr. Zogbi reply to you?

A. Mr. Zogbi stated that he had entered the United States at the Port of Champlain on July 25, 1976 with a barrel action receiver from Montreal and was headed for West Hurley, New York, as the receiver in his possession at that time was defective and he wanted to replace it or exchange it for one that was not.

THE COURT: That was four days before this interview with you?

MR. KOPPELY: Yes, Your Honor.

* * * * *

Defendant Daniel B. Zogbi also known as Danny Zogbi at 12233 Everest Montreal, Canada, doing business as Firearms Sales and Distribution was not authorized to import the Thompson semi-automatic carbeen bearing serial number 1729 or the frame or receiver thereof. Defense Counsel has also stipulated on behalf of the defendant with the assistance of the United States attorney in this case that a United States Customs Service Special Agent seized Government's Exhibit "2A" "B" "C" and "D" at Auto Ordinance Corporation, West Hurley, New York, on July 30, 1976, and that Government's Exhibit "2A" "B" and "C" and "D" has been in the custody and control of the United States Customs Services until entered into evidence at this trial, and Government's Exhibit "2A" "B" "C" and "D" are in the same condition, are in the same condition as when seized by United States Customs Services on July 30, 1976 at Auto Ordinance Corporation, West Hurley New York.

THE COURT: Do you rest?

MR. MCCANN: The Government rests at this time.

THE COURT: Alright, the Jury can take a very short recess.

(Whereupon a short recess was taken.)

THE COURT: Alright, Mr. Ryan, make your motion.

MR. RYAN: Yes, Your Honor, at this time, I would ask that you dismiss the indictment Count 1 against Mr. Zogbi on the grounds that the Government has not met its burden of proof in the matter.

THE COURT: Just a moment, of course, Mr. McCann, lets get it clear, the Government alleges to proceed on Counts 1 and not Count 2, is that correct?

MR. MCCANN: That is correct, Your Honor.

THE COURT: And that is your knowledge as well?

MR. RYAN: Yes, it is, Your Honor.

THE COURT: Now, we will hear your motion.

MR. RYAN: First of all, because I do not believe there has been a sufficient cooperation to show that Mr. Zogbi imported the gun in violation of any law and specifically refer to the second entry at the Port of Champlain, there

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Excerpts from Transcript of Record.

this defendant beyond a reasonable doubt, you should not hesitate for any reason to acquit him. On the other hand, if you find that the Government has established his guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty. Your foreman or forelady then will return and announce a verdict in open court of guilty or not guilty. Are there any exceptions, gentlemen? If so I will hear you up at the bench.

MR. RYAN: None, Your Honor.

MR. MCCANN: The Government has no exceptions, Your Honor.

THE COURT: Alright.

THE COURT CLERK: Raise your right hand. Do you, each of you, solemnly swear you will well and truly keep these persons sworn on this Jury in some private and convenient place, that you will permit no one to talk to them, and that you will not talk to them yourself except to inquire if they have agreed upon a verdict, and until they have agreed?

THE COURT MARSHALL: I do.

* * * * *

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June 12, 1978

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County of Onondaga) ss.:
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United States Attorney

Attorney ☒ for **Plaintiff-Appellee**

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LEE S. MICHAELS, ESQ.
Attorney At Law
410 Metcalf Plaza
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Donald C. Quinn
Notary Public
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cc: **George H. Lowe, Esq.**

